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FILED
MAR 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Docket # 07 - 905

Supreme Court of the United States

Thomas Lamont Dyno

Petitioner

v.

The Village of Johnson City

Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

Reply to Brief in Opposition

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REPLY ARGUMENT

This suit challenges the constitutionality of official Village policy action under color of her zoning ordinance.

The Brief in Opposition **[BO]** in support of **FRCP 12(b)(6)** dismissal generally ignores the express words of my complaint and petition; attempts to misrepresent my claims, compounds fraud on the court **[Pttn 11-12]**; and while the **[BO]** relies on two conclusory statements claiming that I failed to show (1) any Village policy, custom, or (2) the deprivation of any Constitutional right **[BO 5, ¶1]** the alleged facts intended to support those statements reveal policy and policy actions to which municipal liability may attach under Monell **[Pttn 15-18 ff. 17-18]** with said actions subjecting and causing me to be subjected to the deprivation of rights protected under the U.S. Const. **[id 14, 23-25].**

The **[BO]** concedes that the Village made a deliberate choice to follow a course of action based on dismissal of a petition for mandamus to review a Village zoning board decision and does not deny being the driving force behind said action **[Pttn 16-17; 4-6, 8. ¶1]**:

My 3rd Cause of Action - challenges the constitutionality of the Village policy decision to institute a civil action to enjoin me from suing her pro se and **[BO 7]** joining issue she asserts that

> "The Village's decision to seek an injunction to prevent Mr. Dyno from bringing further baseless litigation was neither a policy action nor unlawful"

Under **Pembauer *v* Cincinnati** 475 US 469, 481-484 the foregoing constitutes official policy action **[Pttn 17]**. And while the purpose of that policy may be to conceal her fraud and obstruct a trial she can't win her action deprived me of my Federally protected right of access to the courts and further subjected and caused me to be subjected to a private intentional nuisance in fact depriving me of my property, without due process hearing **Brd of Regents *v* Roth** 408 US 564, 571-572, 577 **[Pttn 23-24]** *see also* **[id 14, 23]**.

Because **JCNY *v* Dyno** is based on said judgment obtained by fraud on the court it is barred by the Clean Hands doctrine **Keystone Driller Co v General Excavator** 290 US 240, 241-245. The **[BO]** does not deny the facts that establish said fraud **[Pttn 11, ¶2]** but merely denies fraud.

My 2nd Cause of Action - misrepresented in **[BO 6]** *cf* **[Pttn 5, 16]** challenges the constitutionality of the Village decision to oppose preliminary injunctive relief against a private use of property "while [my] appeal from that dismissal was pending" **[BO]** claims:

> "The Village's opposition to Mr. Dyno's application does not equate to a municipal policy or practice"

Under **Pembauer** *op cit supra* the foregoing is official policy action based on an arbitrary Village discrimination between the equal rights of adjacent property holders **[Pttn 23]** **Booth *v* R.W. & O.T.R.R. Co**, 140 NY 257, 274-275, 35 NE 592 *in pari materia* a use of land whose legality was never determined **[Pttn 8, 3; 12-14]** this violates US Const due process and equal protection and is actionable under Monell.

My 1st Cause of Action - is also misrepresented and obfuscated by **[BO 4, ¶1]**.

The "individual capacity" fabrication is adequately addressed in my petition **[Pttn 16, ¶1]**. The Village conceded by her answer pleading that at all times set forth in my complaint that the Mayor was acting in his official capacity **[Pttn 6-7 *ff.* 6 last ¶¶; 18]**.

My complaint challenges the constitutionality of official policy making decisions and actions of the Village for which she may be found liable under **Pembauer** *op cit supra* for violations of Federally protected rights. The **FRCP 12(b)(6)** motion ought to be denied **[Pttn 19]** and the matter remanded.

[BO, id] states:

> "Mr. Dyno has failed to address this issue with any specificity. Indeed his only claim in this regard is that Mayor Lewis as the Village's chief executive officer, informed him that the Village intended to comply with the decision of the New York State Supreme Court, which dismissed Mr. Dyno's challenge to the decision of the Village's Zoning Board of Appeals. This lone statement does not meet the personal participation requirement"

The Village is required to comply with the Federal Constitution, which she failed to do. The foregoing statement concedes that the State court proceeding was dismissal of a petition to review a zoning board decision. Said dismissal was issued February 3, 1997. The Village decision/determination to use that dismissal was made in early March 1998.

My complaint is clear, I called the Police, and they refused to act because the Mayor acting in his official capacity and based on said judgment ordered them not to intervene against said use **[A43-46 *ff.* ¶19].** Said decision and policy action subjected and caused me to be subjected to a private intentional nuisance in fact and deprived me of Police protection "for reasons wholly unrelated to any legitimate state objective" **[Pttn 6, n.3]** citing **Village of Willowbrook *v* Olech** 528 US 562, 120 S. Ct. 1073, 145 L. Ed 2d 1060, from whence further actions flowed, and thus:

> "[A] deliberate choice [by the Village] to follow a course of actions [was] made from various alternatives '

(Quoting **Pembauer**. *op cit supra* @ US 481-484 **[Pttn 17-18]**) all of which gave rise to Federal causes of action as set forth in my complaint **[Pttn 7, ¶5]**.

The zoning board is not party to this suit, which challenges the constitutionality of official Village policy decisions and course of action in re application and execution of her zoning ordinance on grounds not raised by the zoning board, which I had no full or fair opportunity to challenge, subjecting me to an injurious use whose legality is not determined.

Nuisance under NYS Law

Copart Ind., *v* Con Ed 41 NY 2d 564, 569, 571:

> "[O]ne is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable"

> "An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct"

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> "[T]hat if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property it is a nusance [sic]: for it is incumbent on him to find some other place to do the act where it will be less offensive"

Under NYS law Trial by Jury is guaranteed for a nuisance action **[Pttn 23] NYS CPLR 4101.2.**

In re **Copart**, *supra* the Village and my neighbors could see that the use was destroying my enjoyment of life and property by an intentional and unreasonable invasion of my home with noise; the Village Police documented damages resulting from the close proximity to my house. The use is a private intentional nuisance in fact (see **Black's Law Dictionary**, 7th Edition). Would a Jury agree? Well the Mayor decided, no Jury is required, here's a judgment obtained on our lawyer's lie which Dyno had no opportunity to challenge let him pay a $5 grand retainer move into a motel or buy the property, the Village is immune **[Pttn 6, ¶5]** the **[BO 9, ¶1]**.

> "If Mr. Dyno believed that his neighbors' use of their property created a private nuisance, his proper course of action would have been to bring a civil claim against them"

Aside from having to buy the property and pay $2 grand a year in taxes for an empty adjacent building as the only means to prevent someone else from using it as a nuisance again: what ought to shock you about this situation is the Village idea that an intentional and unreasonable invasion of my property depriving me of my enjoyment thereof may be something a court says no to; but if government lies and says her zoning ordinance makes such use legal then too bad for me, government has a preferred position over the rule of law and the property rights of an individual. So if Dyno can't have his own complaint then government may side with one neighbor against the other just like she did here. So the Village adopts a lie to facilitate my subjugation. You ought to ask her why she chose this course of action. Because of it, if I mortgage my home lease a lawyer I still can't have an injunction action for a zoning violation nor a nuisance action *cf* [BO 9, ¶1] another **FRCP 11** lie. If the Village theory is correct and I want any redress I can only show that the use is being used in some negligent manner **[Pttn 12, ¶5 - 13]** so until you say no to the Village she holds the use legal on Gibson's lie; as well as her belief that a lawyer, zoning board or Judge may impose that servitude upon anyone or me and not even say why.

The foregoing is arbitrary government. It is precisely what the 14th Amendment was designed to remedy.

Under strict construction of the ordinance, the use is a zoning violation **[Pttn 25, 5]** and if local NYS officials fail to enforce their ordinance then the individual injured in fact may bring an injunction against the violation themselves **[Pttn 15, ¶5]**.

But as I already stated **[Pttn 5-6]** quoting **Shelley v Kraemer** 334 US 1, 92 L. Ed 1161 US 17-22 and @ L. Ed. 1182-11885 ff. @19-20

> "These are not cases, as has been suggested, in which the State have merely abstained from action, leaving private individuals free to impose such [servitudes] as they see fit. Rather these are cases in which the State have made available to such individuals the full coercive power of government to deny [plaintiff] ... the enjoyment of property rights in the premises"

Former Village lawyer Gibson with inadmissible fabrications never served upon me duped motion term into dismissing a mandamus to review petition and more than a year later the Village decides that said dismissal was a declaration that the use in controversy is legal which led to the foregoing policy decision and actions addressed above. And now **[BO]** conceding that the Village sought to enjoin me, opposed my application for injunctive relief from sai[illegible] private use and ordered the Police to not intervene against it all based on the fraud of her former attorney **[BO, 8, ¶ 3]** claims:

> "[T]he Village chose not to intervene in Mr. Dyno's dispute with the Greens ..."

[BO 8, ¶3] :

> "The Village merely determined that the Green's use of their basketball hoop within a residential neighborhood was not a zoning violation"

The use in controversy is a basketball court adjacent to my home in the r6 zone, not use of a basketball hoop **[A80]**.

The properties are located in r(6) a single family residential zone with a minimum 6000 sq. ft lot size and said zone is comprised of 40' wide lots. Under strict construction of the ordinance a basketball court is not allowed on single family residential lots in r6 **[Pttn 9, ¶3; 10]**. Said use is situated 3' from the parallel side of my house on a 40' wide lot **[Pttn 4, ¶1]** the noise therefrom invading my property depriving me of my enjoyment of life and property raises a triable issue of intentional nuisance in fact for a Jury to decide, not motion term or the Mayor.

The Deep Issue

No person has the right to impose a private nuisance and thus no ordinance or Judge can make a private nuisance legal **[Pttn 12]** **Keystone Bituminous Coal *v.* DeBenedictus**, 480 U.S. 470, 491 n. 20 **[Pttn 23]** **Booth *v.* R., W., & O.T.R.R. Co** 140 NY 257, 35 NE 592 @ NY 274-275. The Village has no prerogative nor discretionary authority to "interpret" her ordinance it must be strictly construed **[Pttn 25]** **Cogswell *v.* NY, NH & H. R.R. Co.** 103 NY 10 @ 21. Even if there was room for interpretation, it cannot violate the US Const. **[Pttn id]** **Arkansas Natural Gas Co. *v* Arkansas Railroad Commission** 261 U.S. 379, 383 citing **Railway Co. *v* Arkansas** 235 U.S. 350

If an intentional nuisance in fact deprives an adjacent property holder of any right protected under the US Const, such as the right to be left alone as derived

from the law of nuisance, that a person be secure from unreasonable invasion in their enjoyment of life and property then if the Village by said course of actions subjects or caused me to be subjected to such invasion as the facts alleged show, then the municipality ought to be held liable under 42 USC § 1983.

If this dismissal of petition praying review of the zoning decision cannot bar a nuisance action then it cannot bar this Monell suit regarding official Village policy decisions and action subjecting me and causing me to be subjected to the same deprivation.

I don't see why the Village could not be held liable and neither does **[BO]** which explains the continued compounding of misrepresentation and deceit, **[Pttn 6, "(4)"; 11-12]** attempting to redefine what policy and policy actions are or what said use of land is.

Since the Village concedes that the use is an actionable nuisance, has failed to raise any issue of fact or point of law showing any governmental objective furthered by said subjugation and failing to show Village immunity from such prosecution then my action ought to be granted.

Objection in Point of Law

I) **Affirmative relief to Defendant/respondent is barred by her failure to appeal**

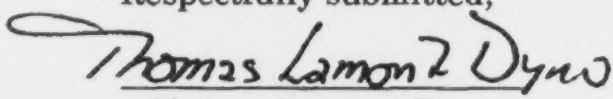
1st - The district court expressly ruled that my claims are not barred by Res Judicata or collateral estoppel. My constitutional challenge to said policy decisions and actions could not have been made before they happened. The Village failed to appeal from that judgment and is therefore barred from seeking relief

on those grounds. My objection on record, is preserved for appeal.

I declare under penalty of perjury that the foregoing is true and correct

Dated:
March 18, 2008

Respectfully submitted,



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